Supreme Court, U.S.
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No. 95-1026

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

Respondent,

v.

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the Arizona Superior Court of Maricopa County has jurisdiction over Ohio residents in an action filed by an Ohio corporation pursuant to Ohio statutes to appraise the value of stock held by shareholders who dissented from the corporation's sale of assets where the Ohio statutes require that such an action be brought in the county where the corporation has its principal offices and the principal offices of the Ohio corporation are located in Maricopa County, Arizona?

LIST OF PARTIES

"Petitioner" is, collectively: Murray & Murray Co., L.P.A. Profit-Sharing Plan and Trust and Dennis E. Murray, Sr., its trustee; and Murray & Murray Co., L.P.A. - Dennis Murray Voluntary Account and Dennis E. Murray, Sr., its trustee.

"Respondent" is: Superior Court of the State of Arizona, in and for the County of Maricopa; the Honorable Michael Yarnell, a judge thereof. The second special action proceeding also involved as Respondent the Superior Court of the State of Arizona, in and for the County of Maricopa; the Honorable Louis A. Araneta, a judge thereof.

"Respondent-Real Party in Interest" is: Performance Industries Inc., fka Mr. Gasket Company, Inc., an Ohio corporation[1].

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[1] Pursuant to Rule 29.1, Rules of the Supreme Court of the United States the following entities are subsidiaries or entities in which Performance Industries, Inc. has an ownership interest: Performance Restaurant Group Inc., an Arizona corporation; Performance Funding Corp., an Arizona corporation; Performance Camelback Plaza Development, Inc., an Arizona corporation as managing member of Camelback Plaza Development, L.C., an Arizona limited liability company; Fabricaciones Metalicas Mexicanas, S.A., a foreign corporation; Performance Restaurants of Nevada, Inc., a Nevada corporation; and Western Pacific Airlines, Inc., a Delaware corporation.

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Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent-Real Party in Interest, Performance Industries Inc. ("Performance"), an Ohio corporation respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Petition") seeking review of the final decision of the Supreme Court of Arizona denying discretionary review of the Arizona Court of Appeals' decision affirming the Superior Court's denial of Petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

OPINIONS BELOW

All decisions rendered below by the Arizona state courts are unreported. The decisions are reproduced in the Appendix to the Petition. References to Petitioner's Appendix shall be denoted as ("App. ____"). References to Performance's appendix shall be denoted as ("R. App. ____").

JURISDICTION

On September 26, 1995, the Supreme Court of Arizona denied Petitioner's petition to review the decision of the Arizona Court of Appeals. (App. 1). Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> *"nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."*

STATEMENT OF THE CASE

To the extent not controverted or supplemented below, Performance adopts the Statement of the Case set forth in the Petition.

Petitioner will hereafter be referred to collectively as "Murray & Murray".

Murray & Murray is a resident of the State of Ohio. Performance is an Ohio corporation with its principal place of business located in Phoenix, Maricopa County, Arizona. Murray & Murray is one of several shareholders from various states who dissented from an extraordinary corporate transaction of Performance which triggered Ohio statutory dissent and appraisal rights established by Ohio Rev. Code § 1701.85 (the "Ohio Code"). (App. 7). The Ohio Code allows dissenting shareholders to receive the "fair cash value" of their shares as determined by the court. On January 6, 1994, Performance instituted this appraisal action pursuant to the Ohio Code in the Superior Court of Maricopa County, Arizona against all dissenting shareholders, including Murray & Murray. Subsequently, Murray & Murray filed a competing appraisal action in the common pleas court of Cuyahoga County, Ohio. (R. App. A).

Murray & Murray made a special appearance in the Arizona Superior Court appraisal action by filing a Motion to Dismiss for Lack of Personal Jurisdiction. The Ohio appraisal action was stayed pending

a resolution of the issue of jurisdiction of the Maricopa County Superior Court over Murray & Murray. On June 7, 1994, the Maricopa County Superior Court denied Murray & Murray's motion to dismiss, holding that Murray & Murray consented to the Superior Court asserting specific jurisdiction to establish the fair cash value of the stock based upon the Ohio Code requirement that the appraisal action be brought in the county where Performance's principal place of business is located. (App. 6).

Murray & Murray pursued an interlocutory review of the June 7, 1994 decision of the Maricopa County Superior Court. The Arizona Court of Appeals accepted discretionary special action jurisdiction and remanded the case to the Superior Court for reconsideration of Arizona's exercise of personal jurisdiction over Murray & Murray in light of the "minimum contacts" required by Shaffer v. Heitner, 433 U.S. 186 (1987) and Batton v. Tenn. Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1997). (App. 5). On remand, the Superior Court analyzed the contacts between Murray & Murray and Arizona and whether or not the minimum contacts analysis was applicable to the court's assertion of jurisdiction under the circumstances of this case. The Maricopa County Superior Court concluded that it could constitutionally assert specific

jurisdiction over Murray & Murray to determine the fair cash value of the stock based upon the forum selection provision of the Ohio Code requiring the appraisal action to be brought in Maricopa County. The court determined that Murray & Murray consented to jurisdiction in Maricopa County by exercising their dissenters rights under the Ohio Code.

Murray & Murray again requested special action jurisdiction by the Arizona Court of Appeals. The Court of Appeals accepted jurisdiction, denied relief to Murray & Murray and adopted the February 8, 1995 opinion of the Maricopa County Superior Court. (App. 3). Murray & Murray's Motion for Reconsideration was denied by the Arizona Court of Appeals. (App. 2).

The Supreme Court of Arizona declined to exercise discretionary review. (App. 1).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The Arizona courts correctly concluded that the Ohio Code requires that appraisal actions be brought in the principal place of business of the corporation. By exercising the rights granted under the Ohio Code, Murray & Murray consented to the Arizona court's exercise

of specific jurisdiction over Murray & Murray for the limited purpose of determining the fair cash value of the dissenters shares of stock in Performance.

Performance respectfully requests that this Court deny Murray & Murray's Petition for Writ of Certiorari.

I. THE DECISION BELOW CORRECTLY DETERMINED THAT PETITIONER'S VOLUNTARY EXERCISE OF THEIR DISSENTERS RIGHTS PURSUANT TO OHIO STATUTORY LAW SUBJECTS PETITIONER TO PERSONAL JURISDICTION IN ARIZONA FOR THE LIMITED PURPOSE OF ESTABLISHING THE FAIR CASH VALUE OF THE DISSENTERS SHARES

In affirming the trial court's acceptance of jurisdiction, the Arizona Court of Appeals adopted Judge Araneta's conclusion that:

> [T]he factual nexus among shareholder, corporation and jurisdiction-selecting statute is constitutionally sufficient to support a single action in Arizona.

(App. 4-7).

This conclusion was reached despite the acknowledgement of the court that the contacts between the State of Arizona and Murray & Murray don't readily fit the decisions in Batton v. Tenn. FarmersMutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) or Shaffer v. Heitner, 433

U.S. 186 (1977) based upon the court's conclusion that Shaffer and Batton do not exclude a finding of consent to jurisdiction. (App. 4-5). Analysis of the "factual nexus" to determine whether jurisdiction exists even if traditional "minimum contacts" analysis would not appear to support jurisdiction is common and acceptable especially where some element of consent can be established. This is true even if it is not the "consent" found in a contractual provision establishing the appropriate venue and jurisdiction for litigation between the parties. A sufficient "factual nexus" might be seen as some contacts between the state asserting jurisdiction and the defendant along with some element of consent, usually implied, on the part of the defendant.

Murray & Murray's "factual nexus" with Arizona is sufficient to warrant Arizona's exercise of specific jurisdiction over Murray & Murray for the limited purpose of valuing the shares of stock of Performance. This situation is analogous to a non-resident motorist who has a motor vehicle accident in Arizona. The contacts with Arizona are not sufficient to constitute a substantial connection with Arizona but are sufficient for specific jurisdiction relating to the automobile accident

itself because the motorist has arguably consented to jurisdiction by his actions of driving a car on Arizona highways.

Specific jurisdiction can be based on a single contract or contact with a jurisdiction when the court's jurisdiction is invoked to enforce obligations arising out of that contract or contact. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). In Burger King, this Court recognized the ". . . inescapable fact[s] of modern commercial life" makes jurisdiction over non-residents appropriate even when they have not physically entered the forum. 471 U.S. at 476. If a non-resident defendant purposefully takes an affirmative action establishing obligations between the non-resident and a resident of the forum, the non-resident has established minimum contacts which ensure ". . . that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, . . . or of the "unilateral activity of another party or a third person". Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

Through the act of buying shares in an Ohio corporation a shareholder, whether an Ohio resident or not, is granted certain rights created by Ohio statute. The shareholder not only assumes the rights

granted by statute but he also is bound by the requirements imposed by these statutes. By becoming a shareholder, a person "consents" to both the rights and the procedural requirements established by these statutes.

The Ohio Code requires dissenting shareholders to "file a petition in the court of common pleas of the county in which the principal office of the corporation that issues such shares is located . . . ." (App. 7). The Arizona courts have ruled that the Ohio courts of common pleas are equivalent trial courts to the superior courts in Arizona and that the reference to "courts of common pleas" is not a jurisdiction restricting phrase but more a descriptive phase to indicate the general trial court of the state.

When examined in the context of the issue in dispute in an appraisal action, the logic of the Ohio Code and the exercise of limited jurisdiction by the Arizona courts is evident. The sole issue in an appraisal action is the fair cash value of the shares on the date of approval of the corporate transaction to which the shareholder dissents. If the parties are unable to agree on the fair cash value, an appraisal action is filed and the court first decides if the dissenting shareholders have properly dissented. If so, the court appoints an appraiser to value

the stock and make a recommendation to the court regarding the fair cash value of the stock. After receiving the recommendation, the court determines the fair cash value of the stock and renders judgment against the corporation in that amount.

The Ohio Code, unlike Delaware's statutory scheme (8 Del. Code § 262), requires the appraisal action to be brought in the county of the principal place of business of the corporation rather than the state of incorporation. No doubt the Ohio General Assembly envisioned the most appropriate forum for an appraisal action is where the corporate books and records are maintained.

Contrary to Murray & Murray's assertion, the purpose of the Ohio Code is not solely for the benefit of shareholders. An intended benefit of the Ohio Code is judicial economy and the avoidance of a multiplicity of suits against a corporation in every forum in which dissenting shareholders reside. Without such a benefit, publicly traded companies like Performance, are subject to world-wide appraisal litigation. The Ohio General Assembly cannot predict where future shareholders will reside when they dissent. However, it can predict that a corporate party will only have one principal place of business at any

time (regardless of how many times it may relocate during its corporate existence). The travel burden on dissenting shareholders cannot be ameliorated prospectively. But it can be avoided entirely for the corporate party by the very statute the Ohio General Assembly enacted.

This Court has recognized that the incorporating state possesses plenary power to enact legislation governing the manner in which litigation shall proceed between a corporation and its shareholders. Cohen v. Beneficial Industrial Loan Corp, 337 U.S. 541, 549-50 (1949). This Court has also recognized that the shareholder's determination to become a stockholder in a corporation inherently carries with that determination the subjection to the statutes of the incorporating jurisdiction as they relate to the corporation/shareholder relationship. Choosing to become a shareholder includes the imputed consent to the provisions of the governing corporate statutes and the enforcement of the governing statutes involves no denial of due process:

> It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it.

. . .

> Whether we support these legal consequences by reference to consent of the stockholder or to his assumption of a corporate relationship subject to the regulatory power of the State of incorporation, in either case the procedure conforms to accepted principles, involves no want of due process, and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned.

. . .

> For a necessary consequence of becoming a stockholder is the assumption of those obligations which, by the laws governing the organization and management of the corporation, attach a stock ownership.

Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 207-08 (1941) (Citations Omitted).

Thus, the constitutionality of deeming a corporate shareholder to have consented to the provisions of the incorporating states law has long been established.

In Hynson v. Drummond Coal Co., 601 A.2d 570 (Del. Ch. 1991), the court held that the act of purchasing shares of stock in a

Delaware corporation operated to put the shareholder on notice of statutes providing for a single appraisal proceeding in a statutorily designated jurisdiction:

> In my opinion, buying stock of a Delaware corporation (or a New York corporation, etc.) is itself a sufficient act to establish a nexus with the jurisdiction that creates and regulates the internal governance of that corporation to render it consistent with traditional notions of fairness to bind the holder of that stock as a plaintiff to adjudications *concerning the corporate rights that attach to the stock*. . . . But it is not unreasonable–not inconsistent with traditional notions of fairness, in my opinion–to conclude that the law has long put the buyer of corporate rights on notice that corporate rights attaching to stock ownership may be adjudicated in a single proceeding in another jurisdiction, including at a minimum, the corporation's state of incorporation.

Id. at 579, (emphasis added).

Thus, Murray & Murray is deemed to have consented to the provisions of the Ohio Code by voluntarily becoming a shareholder in Performance. The Ohio Code became a necessarily implied term in the shareholder relationship between Murray & Murray and Performance. This nexus was deemed sufficient contact by the Arizona courts to exercise jurisdiction over Murray & Murray.

Murray & Murray again consented to be governed by the Ohio Code by invoking its statutory dissenters rights. The Ohio Rev. Code § 1701.85(A)(1) only grants relief to dissenting shareholders in compliance with the Ohio Code. No one forced Murray & Murray to buy Performance's stock or to exercise its dissenters rights. Whether to dissent or remain a shareholder was solely within Murray & Murray's control. The Arizona courts concluded that it is not unconstitutional to require a party who purposefully and voluntarily chose to avail itself to a statutory remedy to pursue that remedy in the jurisdiction designated by the statute.

Murray & Murray maintains that jurisdiction premised upon the unilateral acts of Performance forces Murray & Murray to defend the appraisal action in whatever distant forum Performance unilaterally chooses to relocate its principal place of business. Contrary to Murray & Murray's inference in footnote 4 of the Petition, Performance did not relocate its principal place of business to impose constitutional hardships on Murray & Murray. It is absurd to believe that one Ohio shareholder could have the power to force a corporation to keep its principal offices in the State of Ohio. Corporations move headquarters. Many publicly

traded corporations happen to have their corporate headquarters located in Arizona. The Ohio Code doesn't prohibit a corporate move, but it does require that any appraisal action be brought in the county of the principal place of business of the corporation.

This hybrid form of statutory consent to jurisdiction may not readily fit the decisions in Batton v. Tenn. Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) or Shaffer v. Heitner, 433 U.S. 186 (1977). However, if states can create rights relating to statutorily created entities, states can also mandate where litigation regarding those rights must be brought. This logic is proven by the facts of this case. Murray & Murray asserts that Ohio, like Delaware, should require appraisal actions only in the state of incorporation. If it is constitutional for Delaware to require appraisal actions for domestic corporations to be brought in Delaware, is it not also constitutional for Ohio to require an appraisal action to be brought in the county of the principal place of business of an Ohio corporation? In this case, by mere fortuity, the sole remaining dissenting shareholder is an Ohio resident. Consider however if Performance had filed the appraisal action in Ohio naming as a defendant an Arizona dissenting shareholder. Would the Ohio court

have jurisdiction over an Arizona shareholder with no other contacts to Ohio? To avoid these concerns, Ohio pre-selected the forum – the county where the principal place of business of the corporation is located. Therefore, any person acquiring shares in Performance, or any other Ohio corporation, could reasonably expect to be haled into court in the county where the principal place of business of the corporation is located to litigate the share value of the dissenters shares.

When a party consents to jurisdiction the constitutional minimum contacts test is satisfied. "Where a forum selection clause is held enforceable, the necessity for a due process analysis of the type and extent of the defendant's contacts with the forum . . . is obviated". Morgan Bank (Delaware) v. Wilson, 164 Ariz. 535, 537, 794 P.2d 959, 961 (App. 1990), citing Burger King. Simply stated, consent is a constitutionally sufficient and dispositive "minimum contact". Once consent is found, a further weighing and balancing of contacts is not required.

This Court has also held that the due process "minimum contacts" test is satisfied where there is consent. National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). Such consent can

be constructive or implied. "A variety of legal arrangements have been taken to represent express or implied consent to the jurisdiction of the court." Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 703 (1982). So long as consent is premised on a defendant's purposeful action, the defendant can be found to have constructively or implicitly consented to jurisdiction even if he does not know that he has done so. In Insurance Corp. of Ireland, this Court discussed personal jurisdiction predicated on implied or constructive consent and specifically found that a defendant may constructively consent to the jurisdiction of a particular court by voluntarily invoking state statutory remedies:

> A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. . . . "Parties to a contract may agree in advance to submit to the jurisdiction of a given court." . . . In addition, lower federal courts have found such consent implicit in agreements to arbitrate. . . . Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. See Adam v. Saenger, 303 U.S. 59, 67-68, (1938). ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts. . . . It is the price which the state may exact as a condition of opening its courts to the plaintiff.");

> Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29-30 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which states may differ").

Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 703-04 (1982) (some citations omitted).

The purposeful action in this case was electing to dissent and demanding payment for their shares. This purposeful election set in motion the machinery which resulted in an Arizona appraisal action. The courts below understood that the factual nexus with Arizona involves jurisdiction selected by the governing Ohio statute. If Murray & Murray had not made the purposeful decision to dissent, there would be no lawsuit in Arizona or elsewhere. However, parties may agree in advance to submit to the jurisdiction of a given court. See, National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), this Court also enumerated certain considerations which ". . . sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required". 471 U.S. at 477. Thus, in contrast to the burden on the defendant in litigating in the forum state, the trial court should evaluate:

(1) "The forum State's interest in adjudicating the dispute";

(2) "The plaintiff's interest in obtaining convenient and effective relief";

(3) "The interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and

(4) "The shared interest of the several States in furthering fundamental substantive social policies".

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)

In addition, a year prior to Burger King, the Supreme Court in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), focused on two additional considerations which supported Arizona exercising jurisdiction. First, this Court recognized that where, as here, the forum is the plaintiff's residence, the minimum contacts with the forum may be enhanced. 465 U.S. 780. More importantly, this Court considered the ability of a single forum to resolve multiple claims which would otherwise be litigated in several different states to be an important factor supporting jurisdiction. In Keeton, the plaintiff sought to maintain a single action for nationwide libel under the "single publication rule"

which allows all of the plaintiff's claims for libel to be adjudicated in one case. This Court stated:

> New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule", to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment regarding multiple suits.

465 U.S. at 777.

As in Keeton, multiple, nationwide litigation can be averted by hearing this case in a single forum. It is the public policy of every state to adjudicate all appraisal claims in one unified proceeding. Indeed, the Ohio Supreme Court ". . . concluded that the intent of the [Ohio] General Assembly was that a single determination under R.C. 1701.85 be conducted and not multiple proceedings upon the same issue, with various potential outcomes." Armstrong v. Marathon Oil Co., 32 Ohio St. 3d. 397, 418, 513 N.E.2d 776, 778 (1987).

Murray & Murray made knowing and purposeful contact with an Arizona resident, Performance, by voluntarily exercising its

dissenters rights. Murray & Murray's voluntary election imposed a legal obligation on Performance, an Arizona resident. Murray & Murray had fair warning that electing to dissent may subject it to jurisdiction in Arizona.

> The "fair warning" requirement is satisfied for purposes of asserting specific jurisdiction if the defendant has "purposely directed" its activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities.

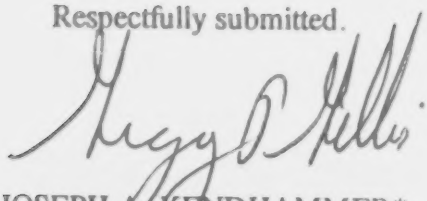
Armstrong v. Aramco Services Co., 155 Ariz. 345, 349, 746 P.2d 917, 921 (App. 1987) (citing Burger King).

The Arizona courts below concluded that exercising their dissenters rights was sufficient contact with Arizona to allow Arizona, the pre-selected forum, to exercise jurisdiction over Murray & Murray for the limited purpose of establishing the fair cash value of the shares owned by Murray & Murray.

CONCLUSION

Respondent-Real Party in Interest, Performance Industries, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted.



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January 1996

APPENDIX A

IN THE COMMON PLEAS COURT OF
CUYAHOGA COUNTY, OHIO

MURRAY & MURRAY CO., L.P.A., PROFIT-SHARING PLAN & TRUST, by and through its trustees, Post Office Box 19 Sandusky, Ohio 44871-0019 and MURRAY & MURRAY CO., L.P.A., PENSION PLAN & TRUST, by and through its trustees, Post Office Box 19 Sandusky, Ohio 44871-0019	
Plaintiffs,	CASE NO. 264046
-vs-	Judge
PERFORMANCE INDUSTRIES, INC. 2401 North First Avenue Tempe, Arizona 85281	**COMPLAINT SEEKING DECLARATORY JUDGMENT**
Please also serve:	Jury Demand Endorsed Hereon
PERFORMANCE INDUSTRIES, INC. 2401 West First Street Tempe, Arizona 85281	

PERFORMANCE HOLDINGS, INC.
2401 North First Avenue
Tempe, Arizona 85281

JOE HRUDKA
c/o Performance Industries, Inc.
2401 North First Avenue
Tempe, Arizona 85281

TOM HRUDKA
c/o Performance Industries, Inc.
2401 North First Avenue
Tempe, Arizona 85281

and

HOWARD GARDNER
c/o Performance Industries, Inc.
2401 North First Avenue
Tempe, Arizona 85281

Please also serve:

HOWARD GARDNER
4807 Rockside Road - Suite 460
Cleveland, Ohio 44131

Defendants.

Murray & Murray Co, L.P.A., Profit-Sharing Plan & Trust, by and through its trustees, and Murray & Murray Co., L.P.A., Pension Plan & Trust, by and through its trustees (collectively "plaintiffs"), for their Complaint seeking declaratory relief and demanding trial by jury, allege:

I. PARTIES.

1. All well-pleaded allegations contained in the preceding paragraph are repleaded as if fully rewritten herein.

2. Plaintiffs are residents of the State of Ohio. Plaintiffs own, collectively, 461,500 shares of stock of Performance Industries, Inc., and its successor corporation, Performance Holdings, Inc. ("Performance"). Plaintiffs have continuously been shareholders of Performance at all times relevant hereto.

3. Defendant Performance Industries is an Ohio corporation with its executive offices located in Cuyahoga County, Ohio, and Tempe, Arizona. Defendant Performance Industries owns property located in Cuyahoga County, Ohio. Performance Holdings is or is expected to be the name of the restyled Performance Industries

subsequent to a sale of the assets of Performance Industries to Walker, and it is named as a defendant herein.

4. Performance Industries, Inc., and Performance Holdings, Inc., are necessary parties to this action because (a) each may have an interest in or claim arising out of this action and/or (b) the presence of the foregoing (1) may be necessary to accord complete relief among those already parties and/or (2) may be necessary to avoid the impairment of an interest of Performance and/or the risk of subjecting certain parties to double or multiple liability.

5. Defendant Joe Hrudka is chairman of the board, director, and controlling shareholder of Performance. Upon information and belief, defendant Joe Hrudka is a resident of the State of Arizona.

6. Defendant Tom Hrudka is a former director and officer of Performance. Plaintiffs do not yet know the state in which Tom Hrudka resides. Defendant Tom Hrudka is a brother of Joe Hrudka.

7. Defendant Howard Gardner is a former director of Performance. Mr. Gardner resigned his position on May 5, 1993. Upon information and belief, Mr. Gardner is a resident of the State of Ohio.

II. NATURE OF THE ACTION.

8. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

9. Plaintiffs bring this suit to obtain a declaration of rights as to a prospective course and pattern of obvious self-dealing, personal utilization, and prospective usurpation of opportunities available to the corporation and waste of corporate assets which will be undertaken by defendants Joe Hrudka, Tom Hrudka, and Howard Gardner (collectively "individual defendants"). Individual defendants are certain present and/or former officers, directors and/or controlling shareholders of Performance Industries and its successor, Performance Holdings, who, by reason of such positions, owe and have owed fiduciary duties. The prospective benefits to the individual defendants would constitute a violation of these duties.

10. As a direct and proximate result of the prospective breaches of fiduciary duties alleged herein and the failure of the board to exercise constraint over such breaches, the plaintiffs will lose hundreds of thousands of dollars arising from the sales of certain assets, including the sale to/transaction with Eschlin and the sale of the majority of the

assets of Performance to Walker Manufacturing Company ("Walker"), a subsidiary of Tennessee Gas Pipeline Company.

11. Plaintiffs seek a declaration of rights that the individual defendants, with regard to their prospective wrongful receipt of moneys and other assets which properly belong to the corporate entity, would be in breach of their fiduciary duties.

III. JURISDICTION AND VENUE.

12. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

13. Jurisdiction of this Court is proper. This action seeks a declaration of rights, pursuant to Ohio R. Civ. P. 57 and R.C. 2721.01, et seq.

14. Venue is proper in this Court for reasons including the following:

a. Upon information and belief, one or more of the defendants resides within Cuyahoga County, Ohio;

b. One of the defendants has his principal place of business within Cuyahoga County, Ohio;

c. One or more of the defendants conducted activity which gives rise to the claim for relief within Cuyahoga County, Ohio;

d. All or part of the claim for relief arose in Cuyahoga County, Ohio; and

e. The stock of the plaintiffs was purchased at the time when the principal place of business of Performance was Cuyahoga County, and these duties which plaintiffs seek to have declared were extant at the time.

IV. FACTS AND ALLEGATIONS.

15. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

16. By Notice of Annual Meeting of Shareholders and accompanying Proxy Statement, each dated November 8, 1993, Performance, by way of defendant Joe Hrudka and the remaining individual defendants, sought shareholder approval of certain transactions. Certain of the transactions for which shareholder approval was sought will be violative of the fiduciary duties which the individual defendants owe plaintiffs.

17. This action is being maintained to obtain declaratory judgment and relief and to prevent (a) substantive and material breaches of fiduciary duties resulting from transactions subject to shareholder approval and (b) transactions which are not subject to shareholder approval and which may or may not be addressed in the Proxy Statement.

18. To the extent that plaintiffs seek to redress substantive prospective breaches of fiduciary duties resulting from transactions referenced in the Proxy Statement and directly or indirectly made subject to shareholder approval, disclosures concerning such transactions are materially misleading, false, incomplete, and omit or otherwise lack sufficient information on which any shareholder could have made an informed decision. Such inadequate, incomplete, false, misleading, and insufficient disclosures constitute further continuing breaches of the fiduciary duties of the individual defendants, including fiduciary duties of candor and to provide complete information.

19. Plaintiffs seek a declaration that all consulting and noncompetition agreements previously entered into between Eschlin and (1) Joe Hrudka and (2) Howard Gardner ("Eschlin noncompetition

agreements") are invalid, null, and void. As explained in the Proxy Statement, the noncompetition agreements with Eschlin provided for (a) receipt by Joe Hrudka of $200,000 on signing and $1.3 million in equal monthly payments over four years and (b) receipt by Howard Gardner of $200,000 on signing and $600,000 in equal monthly payments over four years. The Eschlin noncompetition agreements are not attached to the Proxy Statement and are not yet otherwise available to plaintiffs.

20. Attached as Exhibits D-1 through D-3 to the November 8, 1993, Proxy Statement (and attached hereto and incorporated herein) are three agreements titled "Consulting and Noncompetition Agreement" ("Walker noncompetition agreements") between Walker and Joe Hrudka, Howard Gardner, and Tom Hrudka, respectively.

21. Upon information and belief, the terms and provisions of the Eschlin noncompetition agreements are substantially similar to those of the Walker noncompetition agreement.

22. All allegations and causes of action alleged herein concerning or involving "noncompetition" agreements shall encompass and include the Eschlin noncompetition agreements (entered into by individual defendants Joe Hrudka and Howard Gardner) and the Walker

noncompetition agreements (entered into by individual defendants Joe Hrudka, Howard Gardner, and Tom Hrudka).

23. The Walker noncompetition agreements, which are similar in all respects (except amount of compensation), provide for, inter alia: a 5-year consulting period of up to 20 days per year (travel included); expenses incurred in consulting activities; confidentiality; and, for a period of 15 years, noncompetition in any business of manufacturing or selling exhaust systems products in North America.

24. The Walker noncompetition agreements provided that individual defendants Howard Gardner and Tom Hrudka will receive $500,000 each and that individual defendant Joe Hrudka will receive $1 million.

25. The Walker noncompetition agreements provide for de minimis consulting services for reasons including the compensation appears to be "front-loaded" (thereby placing Walker at immediate disadvantage in enforcing the terms and provisions of such agreements) and the amount of time that may be devoted is extremely limited, and there is no legal recourse to Walker if death or mental or physical incapacity renders any of the "consultants" unable to perform services.

26. The scope of the noncompetition clause of the agreement is overly narrow and does not correspond to the business of Performance Industries or to the expertise of each individual defendant.

27. The payments made under or pursuant to the noncompetition agreements (Walker and Eschlin) are, in reality and by operation of law -- and this Court's declaration so holding is hereby sought -- part and parcel of and included among the assets of Performance. Individual defendants, by reason of the officerships, directorships, and control over the stock and administration of Performance, propose to divert a portion of the assets of Performance to themselves through the vehicle of noncompetition agreements.

28. In return for the noncompetition agreements, individual defendants discounted the price of the assets of Performance sold to Eschlin and Walker.

29. Any payment made or to be made under either the Walker or the Eschlin noncompetition agreements are properly the assets of Performance.

30. The individual defendants both (1) conducted the negotiations with Eschlin and Walker on behalf of Performance and (2)

imposed, in each event, as a condition precedent of a sale of any asset or a sale of all assets, the payment of sums to the individual defendants as provided for in the noncompetition agreements.

31. Any consulting and/or noncompetition agreement which was a material part of the bargain as insisted upon by Eschlin, Walker or any other purchaser should have been granted in course by each of the individual defendants, as incident to the obligations and duties he owed the corporation.

32. If the knowledge and/or noncompetition of the individual defendants is, indeed, valued at $4.3 million, then such value represents an asset and/or opportunity of the corporation, which the individual defendants propose to usurp, divert, and unlawfully take for their own personal profit and advantage.

33. Because Performance had employment contracts with the individual defendants, such employment contracts should be declared to contain confidentiality requirements, including terms which expressly or by implication make corporate knowledge or expertise an asset of the corporation, not its employees.

34. The individual defendants propose to engage in naked, blatant self-dealing by steering to themselves $2 million in an asset sale (Walker transaction) which Performance projected (in the Proxy Statement) to be worth only approximately $10 million. Thus, the individual defendants' consulting/noncompetition fees would equal approximately 20% of the total purchase price of the assets. It is inconceivable that Walker would pay 20% of the purchase price for nebulous consulting services and a narrow noncompetition clause to three individuals in a capital-intensive industry. Instead, it is clear, given (1) the nature of the noncompetition agreements; (2) the dollar amount proposed to be paid to individual defendants under the noncompetition agreements -- in relation to the total asset sale price; (3) the structure and terms of the noncompetition agreements, including the fact that the noncompetition agreements for the Walker transaction were a condition precedent to the transaction; (4) the deflated value of the price for the assets of Performance; (5) the refusal, failure and/or inability to obtain any outside, independent appraisal to support the price of the asset sale; and (6) the control of the individual defendants over Performance and the asset sale negotiations -- that the consideration for

the noncompetition agreements is actually part and parcel of the price for the purchase of assets of Performance.

35. The foregoing paragraph is realleged as to the specifics, currently unknown by plaintiffs, regarding the $2.3 million received and to be received by individual defendants Joe Hrudka and Howard Gardner related to the Eschlin transaction and related Eschlin noncompetition agreements.

36. Upon information and belief, individual defendant Howard Gardner is licensed as a Certified Public Accountant and does not devote and, for relevant periods heretofore, has not devoted full-time attention or effort to the affairs of Performance, including especially the manufacturing, design, and other non-financial affairs of Performance, and, thus, lacks sufficient expertise and knowledge to justify large payments for consulting services and a noncompetition agreement.

37. Assuming that consulting, confidentiality and/or noncompetition clauses are or could be material or important to effectuate the Eschlin, Walker and/or any other similar transaction, the individual defendants, as present and/or former officers and/or directors of Performance, should have been required to enter into employment,

compensation and/or severance packages in favor of Performance and as part of the terms of any existing employment, compensation, or severance packages. Such clauses should have included a provision allowing for the assignment of such agreement to future parties who might succeed to the interests of Performance. If these terms and conditions are not part of the written agreement between Performance and the individual defendants, this Court should, nevertheless, declare them bound by such restrictions.

38. The absence of employment, compensation and/or severance contracts containing terms necessary and important to protect the interests, business, and assets of Performance gives strong indication that the individual defendants, and Joe Hrudka in particular, prepare to conduct the business and affairs of Performance to benefit and advance the personal interests of the individual defendants, at the expense of the plaintiffs.

39. The individual defendants have been paid salaries and bonuses for the knowledge and expertise possessed by such individual defendants. As such, the knowledge and expertise possessed by the individual defendants, to the extent that it is compensable in the sale of

any or all assets of Performance, is an asset of and owned by Performance; and the asset and any value paid for that asset belong to the corporation.

40. Certain of the terms and provisions of and concerning the Eschlin transaction and the sale of the assets of Performance to Walker constitute a gross and egregious waste of the assets of Performance, including the failure to realize a total of $4.3 million of assets owned by Performance.

41. The foregoing facts and allegations establish that the board of directors of Performance unreasonably, without justification, and without appreciation for the clear self-interests and potential for self-dealing are ceding to the controlling shareholder of Performance and a related group of insiders their authority to negotiate and structure the Eschlin transaction and the Walker asset sale; and such board of directors, which subsequently approved such transactions fraught with self-dealing, personal usurpation of corporate opportunities, and waste of corporate assets, thereby acted without adequate knowledge, without independence, and without disinterest.

V. FIRST CAUSE OF ACTION.

42. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

43. The individual defendants, by reason of their present and/or past positions as officers, directors and/or controlling shareholders of Performance, owe fiduciary duties to plaintiffs.

44. The fiduciary duties individual defendants owe plaintiffs include fiduciary duties of care and affirmative duties of loyalty. The fiduciary duty of loyalty includes a duty and obligation to refrain from self-dealing and to refrain from the usurpation and taking of opportunities belonging to the corporation. The fiduciary duty of care includes informed, independent, and disinterested decision making. The fiduciary must, at all times and in all instances, do what is best for the corporation.

45. Each individual defendant, by the proposed acts and omissions alleged herein, will breach the fiduciary duties of care and loyalty owed to the plaintiffs. Each individual defendant, by the proposed acts and omissions alleged herein, will breach the fiduciary duties of care, candor, and complete information.

46. The transactions alleged herein to be in violation of the individual defendants' fiduciary duties lack any legitimate business purpose.

47. The individual defendants will breach, by their proposed conduct, their fiduciary duties (a) separately and (b) collectively, pursuant to a common scheme, conspiracy, course of conduct, and through and pursuant to the aiding and abetting of each individual defendant of the breaches committed by the other individual defendants.

48. The individual defendants will engage in self-dealing and failure to exercise reasonable and ordinary care, diligence, independent judgment, and skill in conducting and administering the affairs of Performance in formulating the terms, structure, and sale price of the Eschlin and Walker transactions.

49. The individual defendants bear the burden of proving at trial that the transactions alleged herein involving self-dealing are intrinsically or inherently fair to the plaintiffs.

50. The conduct of the individual defendants constitutes intentional and deceptive behavior indicative of actual malice and/or

aggravated or egregious fraud and further constitutes a conscious disregard of the rights and interests of the plaintiffs that had a great possibility of causing substantial harm.

VI. SECOND CAUSE OF ACTION.

51. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

52. An issue has arisen as to the appropriate location for the conduct of fair cash value appraisal proceedings. The defendants have taken the position that these proceedings must be held in the State of Arizona. The plaintiffs believe and, therefore, allege that the conduct of these proceedings in Arizona -- as contrasted to Ohio -- violates their right of procedural due process. Accordingly, the plaintiffs ask that this Court declare that the fair cash value proceedings, as contemplated by the Ohio Revised Code, be conducted in Cuyahoga County, Ohio.

VII. THIRD CAUSE OF ACTION.

53. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

54. Defendant Performance has raised or may raise the issue as to the necessity and timing of placing legends on certificates in

Performance owned by the plaintiffs. The laws of the State of Ohio do not require, under the circumstances extant here, that legends be placed on the certificates of stock in Performance which are owned by the plaintiffs -- for the reason that no certificates were issued prior to the commencement of the fair cash value proceedings. Accordingly, plaintiffs pray for declaratory judgment from this Court that there is no necessity of placing legends on the Performance stock owned by the plaintiffs or, alternatively, that any such legends have or will be declared to have been timely placed on the certificates.

WHEREFORE, plaintiffs pray for the following relief:

A. A declaration of this Court that the individual defendants will be in breach of their fiduciary duties owed to plaintiffs as requested in the First Cause of Action;

B. For the relief requested in the Second Cause of Action;

C. For the relief requested in the Third Cause of Action;

D. For reasonable attorneys' fees and costs of this action, including costs of experts;

E. For an order declaring that all past and prospective proceeds from any buyer of assets of Performance, including the Eschlin

or Walker contract transactions, are the assets of Performance and that the individual defendants are entitled to no amount, direct or indirect, which arises out of such contract transactions;

F. For a full accounting of and for a constructive trust to be placed on all benefits, advantages, profits, and other accretions wrongly acquired or realized by the individual defendants;

G. For pre-judgment interest; and

H. For such other legal and/or equitable relief as this Court deems just and necessary.

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JURY DEMAND

Plaintiffs request trial by jury in the foregoing cause of action on all factual issues triable to a jury.

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SERVICE BY CERTIFIED MAIL IS REQUESTED UPON THE DEFENDANTS LISTED ON THE FACE OF THIS COMPLAINT.